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IN THE

Supreme Court of the United States

October Term, 1970
No. 350

LOS ANGELES HERALD-EXAMINER, Division of The Hearst Corporation, and THE SAN FRANCISCO EXAMINER, Division of The Hearst Corporation,
Petitioners,

vs.

RALPH E. KENNEDY, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, appellant in proceedings before the United States Court of Appeals for the Ninth Circuit,
Respondent,

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMEN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMEN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS UNION NO. 9; and LOS ANGELES PAPER HANDLERS' UNION NO. 3, appellees in proceedings before the United States Court of Appeals for the Ninth Circuit,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Questions Presented	2
Statute Involved	3
Statement of the Case	4
Reasons for Denying the Petition	7
1. The Petition Does Not Present Important or Substantial Questions Which Should Be Considered by This Court and This Is Not an Appropriate Case for Consideration of the Issues Raised	7
2. The Orders of the Court of Appeals Dismissing Petitioners' Appeal and Denying Petitioners Leave to Intervene in Respondent Regional Director's Appeal of the District Court's Order Dissolving the Temporary Injunctions Issued Under Section 10(l) of the Act Are Not in Conflict With This Court's Decision in Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283 v. Scofield, 382 U.S. 205 (1965)	14
3. The Order of the Court Below Is Consistent With the Letter and Spirit of Section 10(l) and With the Intent of Congress in the Norris-LaGuardia Act and the National Labor Relations Act, and Permits Charging Parties to Participate in the Section 10(l) Proceeding to the Full Extent Intended by Congress	17
4. There Is No Conflict Among the Courts of Appeal on the Questions Presented	22
Conclusion	24

TABLE OF AUTHORITIES CITED

Cases — Page

Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 452 (1955) 18

Amazon Cotton Mill, 167 F. 2d 183 (4th Cir. 1948) 19

Bakery Sales Drivers Local Union No. 33 v. Wagshal, 333 U.S. 437 (1948) 18

General Committee v. Missouri K.T.R. Co., 300 U.S. 323 (1943) 19

Henderson v. IUOE, Local 701, 420 F. 2d 802 (9th Cir., 1969) 22

Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283 v. Scofield, 382 U.S. 205 (1965) .....8, 11, 12 .....14, 15, 16, 17, 20, 23

McLeod v. General Electric Co., 366 F. 2d 847 (2d Cir., 1966) 23

NLRB v. Nashville Bldg. & Const. Trades Council, 383 F. 2d 562 (6th Cir., 1967) 23

San Francisco-Oakland Newspaper Guild, et al. v. Kennedy, 412 F. 2d 541 (9th Cir., 1969) 5

San Francisco-Oakland Newspaper Guild, et al. v. Kennedy, Docket Nos. 22757-8-9 (9th Cir., May 20, 1968), cert. denied, 393 U.S. 926 (1968) 22

Sears, Roebuck & Co. v. Local 419, Carpet Layers, 410 F. 2d 1148 (10th Cir., 1969), ... U.S. ....., 90 S. Ct. 1299 (1970) 9, 10, 22

Statutes Page

National Labor Relations Act, Sec. 8(b)(4)(i)(ii)-(B) 4
National Labor Relations Act, Sec. 10 19
National Labor Relations Act, Sec. 10(b) 20
National Labor Relations Act, Sec. 10(e) 8, 11, 12, 14, 15, 16, 17, 20
National Labor Relations Act, Sec. 10(f) 8, 11, 12, 14, 15, 16, 17, 20
National Labor Relations Act, Sec. 10(h) 19
National Labor Relations Act, Sec. 10(j) 7, 8, 18
National Labor Relations Act, Sec. 10(1) ....2, 3, 4, 7 ..8, 9, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23
Norris-LaGuardia Act, Sec. 10 19
United States Code, Title 29, Sec. 101 18
United States Code, Title 29, Sec. 158(b)(4)(i)(ii)-(B) 4
United States Code, Title 29, Sec. 160(b) 20
United States Code, Title 29, Sec. 160(e) 14
United States Code, Title 29, Sec. 160(f) 14
United States Code, Title 29, Sec. 160(1) 2, 3, 4

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Petitioners,

vs.

RALPH E. KENNEDY, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, appellant in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondent,

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMEN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMEN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS UNION NO. 9; and LOS ANGELES PAPER HANDLERS' UNION NO. 3, appellees in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondents, San Francisco-Oakland Newspaper Guild, Newspaper and Periodical Drivers' and Helpers' Union Local 921, Los Angeles Newspaper Guild, Local 69, Los Angeles Web Pressmen's Union No. 18, Los Angeles Stereotyper's Union No. 58, Los Angeles Typographical Union No. 174, International Association of Machinists and Aerospace Workers, District Lodge

No. 94, General Warehousemen's Union Local 598, Building Service and Maintenance Employees Union No. 399, Los Angeles Mailers' Union No. 9, and Los Angeles Paper Handlers' Union No. 3, hereinafter referred to as "Respondent Unions", pray that the petition for a writ of certiorari to review the orders of the United States Court of Appeals for the Ninth Circuit dismissing petitioners' appeal and denying petitioners' motion to intervene, be denied.

Questions Presented.

1. Does a charging party in proceedings instituted by the National Labor Relations Board pursuant to Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C., section 160(1), have standing to appeal from a decision of the district court where the National Labor Relations Board has appealed from that decision and is prosecuting the appeal?

2. Does a charging party, in proceedings instituted by the National Labor Relations Board pursuant to Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C., Section 160(1), have an absolute right to intervene as a party in an appeal from the decision of the district court filed by the National Labor Relations Board where the charging party's position on the appeal is being prosecuted by the National Labor Relations Board and where the charging party has been afforded the opportunity to appear as an *amicus curiae*, to file a brief, and to argue orally?

Statute Involved.

Section 10(1) of the National Labor Relations Act, as amended, 29 U.S.C., Section 160(1), provides in relevant part:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b) or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . . . Upon filing of any petition the court shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony. . . ."

Statement of the Case.

On January 12, 1968, respondent Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, hereinafter referred to as "Respondent Regional Director", filed a petition for injunction under Section 10(1) of the National Labor Relations Act (29 U.S.C., Section 160(1)), in the United States District Court, Northern District of California, alleging that petitioners herein had filed unfair labor practice charges with the National Labor Relations Board, charging that respondent unions were engaging in activity in violation of Section 8(b)(4)(i)(ii)(B) of the Act (29 U.S.C., Section 158(b)(4)(i)(ii)(B)), further alleging that respondent Regional Director had reasonable cause to believe that respondent unions had engaged in the unfair labor practices charged, and requesting a temporary injunction pending final disposition by the Board of said unfair labor practice charges. The district court issued an order on February 7, 1968 and a supplemental order on February 8, 1968, granting the temporary injunction requested by respondent Regional Director.

Respondent unions appealed to the Court of Appeals for the Ninth Circuit, seeking a reversal of the judgment of the district court. Petitioners, charging parties below, filed a motion for leave to intervene in the proceedings. On May 20, 1968, the Court of Appeals denied petitioners leave to intervene but permitted them to appear and file a brief as *amici curiae*. Petitioners

petitioned this Court for a writ of certiorari on the denial of their motion to intervene, but certiorari was denied. 393 U.S. 926 (1968). Petitioners participated as *amici curiae* in the proceeding on the merits before the Court of Appeals and on June 4, 1969, the Court of Appeals affirmed the decision of the district court. *San Francisco-Oakland Newspaper Guild, et al. v. Kennedy,* 412 F. 2d 541 (9th Cir., 1969).

On February 20, 1970, respondent unions moved the district court to dissolve the temporary injunctions granted on February 7 and 8, 1968, on the grounds that said temporary injunctions had been in effect for more than a reasonable period of time and that it was no longer just and proper to maintain them in effect. On April 6, 1970, after consideration of affidavits, memoranda of points and authorities, and oral argument, the district court dissolved said temporary injunctions, concluding that they had been in effect for more than a reasonable period of time and that it was no longer just and proper to maintain them in effect. That same day, Respondent Regional Director and petitioners filed separate notices of appeals and requests for stays of the district court's order. On April 14, 1970, the Court of Appeals granted the petitioners' motion for a stay of the district court's order pending appeal. On May 19, 1970, however, on reconsideration, the Court of Appeals vacated its order of April 14, 1970, granted Respondent Regional Director's motion to dismiss petitioners' appeal, which motion was based

on petitioners' lack of standing to appeal, and granted Respondent Regional Director's motion for a stay of the district court's order pending determination of Respondent Regional Director's appeal (Cause No. 25,656).

Following the dismissal of their appeal, petitioners sought leave to intervene on Respondent Regional Director's appeal (Cause No. 25,656). On June 15, 1970, the Court of Appeals denied leave to intervene. On June 26, 1970, the Court of Appeals granted petitioners *amici curiae* status, as well as the right to file a brief and to share in the argument time of Respondent Regional Director. Briefs on the merits of the appeal were filed by Respondent Regional Director (appellant), respondent unions (appellees), and petitioners (*amici curiae*). Oral argument on the merits was held on July 8, 1970. Petitioners participated in the oral argument, sharing equally with Respondent Regional Director the time alloted to the appellant for argument. During oral argument, petitioners, for the first time, raised the argument that respondent unions could have availed themselves of an alleged alternative remedy, *i.e.*, writ of mandamus against the Board; petitioners had not raised this issue in the district court nor in their brief to the Court of Appeals. The appeal has been taken under submission by the Court of Appeals.

REASONS FOR DENYING THE PETITION.

1. The Petition Does Not Present Important or Substantial Questions Which Should Be Considered by This Court and This Is Not an Appropriate Case for Consideration of the Issues Raised.

The petition presents two questions relating to the rights of charging parties to participate in appellate proceedings arising out of Section 10(1) proceedings instituted by the National Labor Relations Board. The questions raise narrow, peripheral, insignificant issues unrelated to the substantive provisions of Section 10(1). Moreover the insignificance of the questions presented becomes even more apparent when we consider the paucity of Section 10(1) appeals which reach the courts of appeals.

A review of volumes 398 to 412, inclusive, of the Federal Reporter, 2d series, encompassing roughly a twelve month period from approximately July 1, 1968 to June 30, 1969, discloses only three court of appeals decisions in Section 10(1) cases and none in Section 10(j) cases. Similarly, a review of volumes 380 to 397, inclusive, of the Federal Reporter, 2d series, encompassing roughly a twelve month period from approximately July 1, 1967 to June 30, 1968, discloses only one court of appeals decision in a Section 10(1) case and two in Section 10(j) cases.

The small number of Sections 10(1) and 10(j) cases which reach the courts of appeals is, of course, a direct result of the nature of these proceedings. Under Section 10(1) the National Labor Relations Board is authorized to seek preliminary injunctive relief against certain specified types of unfair labor practices pending a decision by the Board on the merits of the charges.

Section 10(j) is an analogous provision authorizing preliminary injunctive relief in other cases where it is necessary. Preliminary relief under Section 10(j) or 10(l) is sought by the Board in only a small percentage of its cases. Since the relief is *pendente lite*, only a few of these Section 10(l) or 10(j) cases ever reach the courts of appeal, and even fewer are decided by the courts of appeals.

It becomes even more apparent that there is only a *de minimus* number of Section 10(l) appeal cases decided by the courts of appeals when we contrast the number of Section 10(l) appeal cases (three in one year and one in another) with the three hundred and one enforcement and/or review proceedings under Sections 10(e) and (f) of the Act decided by courts of appeal during fiscal years 1968, as reported in the Thirty-Third Annual Report of the National Labor Relations Board, Appendix A, Tables 19 and 19A, pp. 240-241.*

Thus, exceedingly few Sections 10(l) or 10(j) appeals are decided by the courts of appeals, and, quite obviously, the question of intervention or standing of a

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*Sections 10(e) and (f) provide for enforcement and/or review of all final decisions of the Board. The proceedings arise after a full hearing and decision on the merits by the Board; the courts of appeals' decisions are, of course, final decisions on the merits. Courts of Appeal consider large numbers of such cases each year. In *Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283 v. Scofield*, 382 U.S. 205 (1965), relied on by petitioners herein, this Court considered the rights of successful charged and charging parties to intervene in Sections 10(e) and (f) proceedings. The questions considered the *Scofield*, unlike the questions presented here, involved the right to participate in review and enforcement proceedings on the merits, after having participated as a party in the Board proceeding on the merits, and involved Sections 10(e) and (f) proceedings which are before courts of appeals on a frequent and regular basis.

charging party is involved even less frequently. Some charging parties undoubtedly do not participate at all and others are not concerned with becoming full parties.

Despite the exceedingly small number of Section 10(l) cases decided by the courts of appeals, this Court recently granted certiorari in *Sears, Roebuck & Co. v. Local 419, Carpet Layers*, ... U.S. ....., 90 S. Ct. 1299 (1970), a Section 10(l) case in which the standing of a charging party to appeal was raised. Petitioners argue that the issue raised in *Sears, Roebuck* is identical to the first question presented herein—whether charging parties have standing to appeal from a district court decision in a Section 10(l) proceeding. The issue raised in *Sears, Roebuck*, however, went far beyond the limited questions presented here, for *Sears, Roebuck*, unlike the instant case, involved an attempt by an interested person to appeal and to pursue litigation when the government agency charged with responsibility in the matter had refused to act. Quite obviously, the issue in *Sears, Roebuck* had ramifications beyond Section 10(l) and beyond the National Labor Relations Act, and involved a question of the right of a private party to take action which is normally within the province of a federal agency, when the federal agency has chosen not to take action.

In *Sears, Roebuck*, the National Labor Relations Board had chosen not to appeal from an adverse decision of the district court and the charging party had attempted to do what the Board would not. The court of appeals dismissed the appeal filed by the charging party, leaving no appeal of the adverse district court decision. The court of appeals' dismissal of the charging party's appeal in *Sears, Roebuck* terminated all litiga-

tion in the injunction proceeding, and left the charging party without a temporary injunction, without a forum to question the correctness of the district court's decision, without an opportunity to present its position or to have its position presented to a court of appeals, and without a court of appeals decision on the merits.

In the instant case, the National Labor Relations Board has appealed from the decision of the district court, has fully prosecuted that appeal, and has fully protected the interests of the charging parties. Indeed, on the same day that the charging parties filed a notice of appeal and a request for a stay of the district court order, the Board also filed a notice of appeal and a request for a stay. The Board obtained the stay, filed a brief on the merits and argued orally before the court of appeals; the appeal has been taken under submission and there is absolutely no indication that the Board is even considering dropping the appeal. On the contrary, the Board has vigorously prosecuted the appeal at all stages, and fully represented the charging parties' interests. Moreover, the charging parties have fully participated in the appeal, have filed a brief on the merits, have argued orally, and have been afforded the opportunity to present any argument they chose to raise. The dismissal of the charging parties' appeal by the Ninth Circuit herein, unlike the dismissal of the charging party's appeal by the Tenth Circuit in *Sears, Roebuck*, will have no impact whatsoever on the court's decision on the merits, and no effect whatsoever on the presentation of charging parties' position.

Assuming, *arguendo*, that the question presented in *Sears, Roebuck* was a substantial or important question

in the context of that case, it is clear that the question of the standing of petitioners herein to appeal is insignificant and academic. Under these circumstances, respondent unions respectfully submit that the question of the standing of charging parties in the instant case to appeal from the decision of the district court is not sufficiently important for consideration by this Court, and that this is not an appropriate case for consideration of the issue raised.

The second question presented by the petitioners raises the issue of a charging party's right to intervene in an appeal of a district court decision under Section 10(1) of the Act. This Court, of course, previously denied certiorari to these same petitioners on the identical issue when they sought to intervene in an earlier appeal to the Ninth Circuit in the instant Section 10(1) proceeding. 393 U.S. 926 (1968).

Petitioners again argue here, as they did in 1968, that the decision of the Ninth Circuit denying them leave to intervene is in conflict with this Court's decision in *Intl. Union, United Automobile, Aereospace & Agricultural Implement Workers of America, Local 283 v. Scofield*, 382 U.S. 205 (1965). As we shall demonstrate, *infra*, the decision of the Ninth Circuit in no way conflicts with this Court's decision in *Scofield*, and is the appropriate and correct decision under the statutory framework of Section 10(1) of the Act. As will be discussed *infra*, *Scofield* involved questions of participation and rights of charging and charged parties in enforcement and review proceedings under Section 10(e) and (f) of the Act following a full hearing and final decision by the Board on the merits of the case. The questions raised in *Scofield* involved an entirely differ-

ent statutory scheme from that involved herein, with entirely different practical and legal considerations, and an entirely different legislative intent and totally different policy considerations.

Scofield involved substantial and important questions, but the questions raised here, while falling within the same broad area of charging parties' rights, arise in the context of temporary, interim injunctive relief under Section 10(1) of the Act and are insignificant in the framework of federal labor policy. The question of a charging party's right to intervene in a Section 10(1) appeal is particularly insignificant where, as here, the charging party has been afforded *amicus curiae* status, has filed a brief on the merits with the court of appeals, and has argued orally.'

As we have demonstrated above, courts of appeals decide a substantial number of Section 10(e) and (f) proceedings—the type of proceedings involved in *Scofield*—each year. During fiscal 1968, three hundred and one such cases where decided by the courts of appeals. Section 10(1) cases, however, are decided only infrequently by the courts of appeal. Only four such cases appear in the Federal Reporter volumes covering roughly a two year period from July 1, 1967 to June 30, 1969.

Petitioners, in attempting to overcome the lack of importance of the questions they have presented, argue that there are issues they might present which the Board would not or could not present. In particular, petitioners point to an argument regarding an alleged alternative remedy which respondent unions could have utilized, *i.e.*, writ of mandamus against the Board. Petitioners' contentions here with respect to that argu-

ment are, however, highly misleading. Petitioners did not raise that argument themselves in the district court, although they fully participated in the district court proceedings, nor in their brief on the merits to the court of appeals. Petitioners first raised the issue in oral argument to the courts of appeals. In any event, they were permitted to present their arguments on this issue at that time.

Furthermore, this is not an appropriate case for consideration of the question presented since the identical question of these charging parties' right to intervene was finally determined against the petitioners two years ago, and certiorari was denied on this issue. 393 U.S. 926 (1968). The law of this case on the question presented has, therefore, been previously decided finally against petitioners and they cannot now raise the question again in this case.

Petitioners' earlier motion to intervene was denied by the Ninth Circuit in an earlier appeal in the instant case. That first appeal involved the same parties and the same temporary injunctions as are involved in the current appeal. The issue in the first appeal was whether the temporary injunctions against respondent unions had been properly granted and should remain in effect; the issue in the current appeal is whether those same temporary injunctions should still be maintained in effect two years later. The interests of the respective parties in the first appeal were identical to their respective interests in the current appeal; in both appeals petitioners and Respondent Regional Director sought to maintain the temporary injunctions in effect and respondent unions sought to terminate said injunctions. The question of petitioners' right to intervene before the

Court of Appeals in this case was finally determined against them two years ago in the first appeal. Thus, the instant petition constitutes merely one further attempt to intervene on the same grounds in the same case, even though that issue has previously been finally resolved against petitioners.

Clearly the questions presented here, are relatively insignificant questions, having little or no importance in the spectrum of federal labor policy. Respondent unions respectfully submit that this petition does not present substantial or important questions worthy of consideration by this Court and that, in any event, this case is not an appropriate one for consideration of the issues raised.

2. The Orders of the Court of Appeals Dismissing Petitioners' Appeal and Denying Petitioners Leave to Intervene in Respondent Regional Director's Appeal of the District Court's Order Dissolving the Temporary Injunctions Issued Under Section 10(1) of the Act Are Not in Conflict With This Court's Decision in Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283 v. Scofield, 382 U.S. 205 (1965).

In *Scofield,* this Court held that charging parties and charged parties in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the court of appeals in proceedings reviewing an NLRB order under Section 10(e) and (f) of the National Labor Relations Act (29 U.S.C., Section 160(e) and (f)). Petitioners contend that the Ninth Circuit's order in this proceeding denying them the right to intervene in an appeal of an order issued by the district court under Section 10(1) of the National

Labor Relations Act is in conflict with this Court's decision in *Scofield,* and attempt to analogize proceedings under Section 10(1) to proceedings under Section 10(e) and (f). It is clear, however, that this Court's decision in *Scofield* is inapplicable to the questions presented here.

In *Scofield,* this Court was careful to confine the scope of its ruling to the question of intervention in the courts of appeals in NLRB review proceedings under Section 10(e) and (f).

> "Lacking a clear directive on the subject, we look to the statutory design of the Act. Cf. *Scripps-Howard Radio v. Commission,* 316 U.S. 4, 11, 62 S. Ct. 875, 86 L. Ed. 1229. Of course, in considering the propriety of intervention in the courts of appeals, our discussion is limited to Labor Board *review* proceedings. Federal agencies are not fungibles for intervention purposes—Congress has treated the matter with attention to the particular statutory scheme and agency. . . ." (382 U.S. at 210). (Emphasis added).

In *Scofield,* this Court relied heavily upon the statutory scheme of Section 10(e) and (f), a statutory scheme wholly different from that contained in Section 10(1). In particular, this Court relied upon the fact that the charging party is a full party in the Board proceedings which are being reviewed and that Section 10(f), unlike Section 10(1), provides that "any person aggrieved by a final order of the Board . . . may obtain review of such order. . . ."

Moreover, the rationale of this Court in *Scofield* in allowing intervention in review proceedings is wholly

inapplicable to proceedings under Section 10(1) of the Act. As this Court pointed out, any party aggrieved by a Board order may seek review of that order and if a successful charging party or charged party is not allowed to intervene in the first appellate review proceeding, there is a possibility of a remand to the Board followed by a ruling against the previously successful party with the attendant possibility of a second appeal to the court of appeals by the party which was not permitted to intervene in the original appellate review proceeding. Thus, denying intervention to a successful charging party or charged party in the first appellate review proceeding may lead to undesirable duplication of proceedings and "circuit shopping". 382 U.S. at 212-213, 222, fn. 20.

It is clear that the considerations which warrant intervention in enforcement and review proceedings under Section 10(e) and (f) do not exist in proceedings under Section 10(1). Under Section 10(1) there is no possibility of duplication of proceedings which might result from the denial of intervention. If the charging parties are not permitted to intervene in the proceedings in a Section 10(1) appeal, and if there is a remand to the district court with a subsequent ruling in favor of appellants, charging parties will not have the opportunity to review this ruling in a subsequent appeal, as would be the case under Section 10(e) and (f). The problem considered by this Court in *Scofield* was that charged parties and charging parties who were not allowed to intervene in the first appellate proceeding might subsequently have a right to bring an appeal themselves as aggrieved persons. This problem simply does not exist under Section 10(1).

In short, the question of intervention in proceedings on a Section 10(1) appeal is an entirely different question from that considered by this Court in *Scofield* with respect to intervention in review and enforcement proceedings under Section 10(e) and (f). Thus, the order of the Court of Appeals denying intervention in the instant proceeding is not in conflict with this Court's decision in *Scofield*.

Moreover, as we shall demonstrate *infra*, there are a number of compelling policy reasons for denying charging parties status as full parties in Section 10(1) proceedings. It is clear that in Section 10(1), unlike Section 10(e) and (f), Congress intended to limit and restrict the rights of charging parties, and did in fact do so.

3. The Order of the Court Below Is Consistent With the Letter and Spirit of Section 10(1) and With the Intent of Congress in the Norris-LaGuardia Act and the National Labor Relations Act, and Permits Charging Parties to Participate in the Section 10(1) Proceeding to the Full Extent Intended by Congress.

Congress, in enacting Section 10(1) of the Act, provided for interim injunctive relief with respect to certain kinds of unfair labor practices. Congress sought to protect the public interest, but also carefully spelled out the rights of the private parties involved in the labor dispute. Cognizant of the odious history of the *ex parte* labor injunction and of the fact that private litigants involved in a labor dispute could not be expected to afford one another just treatment in an injunction proceeding, and yet mindful of the importance of time, Congress provided for an expedited procedure but limi-

ted the length of time a temporary restraining order could remain in effect, and gave to the National Labor Relations Board the authority to institute and prosecute the proceedings, while spelling out in detail the rights of private parties to ensure that the interests of respondents, as well as charging parties, are fully protected.

In a careful balancing of interests, Congress specifically limited the rights of the charging party. It was clearly the intent of Congress to preclude private parties from seeking or obtaining injunctive relief under Section 10(1). Nor did Congress intend that private parties should be permitted to intervene or to appeal and seek an injunction from a higher court which they could not have sought or obtained from the lower court. Rather, Congress chose to protect the public interest, while at the same time protecting the interests of respondent and charging party, by providing the charging party with certain specific rights, *i.e.*, the right to appear and present relevant testimony.

In Sections 10(j) and 10(l) of the Act, Congress enacted a narrow exception to the prohibitions of the Norris-LaGuardia Act (29 U.S.C., Section 101, *et seq.*), against temporary injunctive relief in labor disputes. It is well settled that this narrow exception, removing the limitations of the Norris-LaGuardia Act upon the power to issue labor injunctions, was applicable only where the administrative agency entrusted with the enforcement of the Act, the National Labor Relations Board, seeks the injunction, not where it is sought by a private party. *Bakery Sales Drivers Local Union No. 33 v. Wagshal*, 333 U.S. 437 (1948); *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 452, 517 (1955).

Petitioners argue that Section 10(h) of the Act excepts all proceedings under Section 10 from the provisions of the Norris-LaGuardia Act. It is clear, however, that in Section 10 of the National Labor Relations Act Congress carved out certain express exceptions to the provisions of Norris-LaGuardia, and that Congress intended to create no other exceptions than those specifically set forth in Section 10(1). As the Fourth Circuit said in *Amazon Cotton Mill*, 167 F. 2d 183 (4th Cir., 1948), quoting the language of this Court in *General Committee v. Missouri K.T.R. Co.*, 320 U.S. 323, 332 (1943), and applying it to the National Labor Relations Act:

> "On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." (157 F. 2d at 186).

The rights of parties to participate in various proceedings are spelled out in detail in Section 10 of the Act, and Congress clearly chose to set forth wholly different procedural rules under Section 10(1) from those established with respect to proceedings before the Board and subsequent review or enforcement proceedings. Section 10(1) provides that the charging party shall be

given an opportunity to appear by counsel and present any relevant testimony in the proceedings for a temporary injunction. It does not provide that the charging party may intervene in such proceedings or that he may become a party to the proceedings. In Section 10(b), 29 U.S.C., Section 160(b), however, Congress specifically provided for intervention in the Board proceeding on the merits. And, as this Court pointed out in *Scofield, supra,* the charging party is accorded formal recognition in the Board proceeding; he participates in the hearing as a "party" and he may file exceptions to any order of the trial examiner.

Similarly, Section 10(1), unlike Section 10(f), does not provide that any person aggrieved by a decision can seek review.

It was not by accident that Congress provided for varying degrees of participation on the part of charging parties. The review proceedings contemplated under Section 10(e) and (f) of the Act follow a full hearing on the merits before the Board with all parties participating. In a Section 10(e) and (f) proceeding the findings of the Board must be supported by substantial evidence on the record considered as a whole. Section 10(1) provides for interim relief, a temporary restraining order and/or a preliminary injunction after a preliminary investigation by the Board but prior to any hearing on the merits. The petitioning Regional Director under Section 10(1) must show only that there is reasonable cause to believe that a violation of the Act has occurred.

The limitation on participation of charging parties in preliminary Section 10(1) proceedings, prior to a Board decision on the merits, is also necessary because

of the importance of time when a preliminary labor injunction is at issue. Obviously, the injunction is of critical importance in a labor dispute, and once an injunction has been issued time is of the essence to the respondent. As we have demonstrated, *supra,* Congress was fully aware that time was often of critical importance to all parties, and therefore provided for an expedited procedure and also limited the period of time a temporary restraining order could remain in effect.

Respondents' interests in speedy resolution of the case were further protected by limiting the parties to the Board and respondent, and by not affording the charging party full status as a party. If an injunction issues, and respondent chooses to appeal, he is, of course, interested in obtaining a decision on appeal as quickly as possible, since time is usually of the essence. Public policy also favors a quick decision, for if the injunction was granted erroneously, it should be removed as quickly as possible in light of its critical importance in the labor dispute. The Regional Director, acting in the public interest, would undoubtedly present no unreasonable roadblock to a quick decision. The charging party, however, is in no hurry to obtain a decision once there is an injunction in effect. If the charging party were a full party, it might well be able to dictate and control the course of litigation, not in the public interest, and not in accordance with Congressional intent, but solely in its own interest, and respondents might well be deprived of the opportunity to have their appeal heard at a time when it still made some practical difference.

Congress intended to limit the rights of charging parties to participate in Section 10(1) proceedings,

and did in fact do so. Congress has precluded private parties from seeking or obtaining temporary injunctive relief under Section 10(l). It was not the intent of Congress to allow a private litigant to appeal and seek an injunction from a higher court which only the Board could seek below, or to permit a charging party to intervene and become a full party with the power to dictate the course of litigation in Section 10(l) proceedings.

The decisions of the Ninth Circuit dismissing petitioners' appeal and denying petitioners the right to intervene in this proceeding properly limit the participation of private litigants in Section 10(l) proceedings to the extent intended and expressly provided for by Congress in Section 10(l).

4. There Is No Conflict Among the Courts of Appeal on the Questions Presented.

The Court of Appeals for the Ninth Circuit has considered the question of a charging party's rights on appeal of a district court decision under Section 10(l) on two occasions prior to the instant decisions, and on both occasions the Ninth Circuit concluded that a charging party does not have the right to participate as a full party to such proceedings. *San Francisco-Oakland Newspaper Guild, et al. v. Kennedy*, Docket Nos. 22757-8-9 (9th Cir., May 20, 1968), cert. denied, 393 U.S. 926 (1968); *Henderson v. IUOE, Local 701*, 420 F. 2d 802 (9th Cir., 1969). The Court of Appeals for the Tenth Circuit is in accord. *Sears, Roebuck & Co. v. Local 419, Carpet Layers*, 410 F. 2d 1148 (10th Cir., 1969), dismissed for mootness, ... U.S. ....., 90 S. Ct. 1299 (1970).

Although *amicus curiae* argues that the decisions of the Second Circuit in *McLeod v. General Electric Co.*, 366 F. 2d 847 (2d Cir., 1966), and of the Sixth Circuit in *NLRB v. Nashville Bldg. & Construction Trades Council*, 383 F. 2d 562 (6th Cir., 1967), indicate an approach to the question different from that of the Ninth and Tenth Circuits, it is clear that neither the Second Circuit or Sixth Circuit has ruled upon or even discussed the right of a charging party to intervene, and that there is no decision by a court of appeals in conflict with the decisions of the Ninth and Tenth circuits.

In *McLeod v. General Electric Co.*, 366 F. 2d 847 (2d Cir., 1966), there is neither a holding nor a discussion by the Second Circuit on the issue of intervention by the charging parties. Charging parties' intervention in that case was not opposed and the issue was neither raised nor considered. Moreover, the charging party was not in fact treated as an intervenor since the court granted it only the right to file a brief while denying leave to argue orally.

In *NLRB v. Nashville Bldg. & Const. Trades Council*, 383 F. 2d 562 (6th Cir., 1967), the Sixth Circuit had before it three legal proceedings: an appeal of a temporary injunction granted by the district court under Section 10(1), a petition for writ of mandamus filed by the respondent union, and a petition for enforcement of the final NLRB order on the merits. The court noted at page 563, footnote 1, that the petition of the charging party to intervene "in the enforcement proceedings" was granted, citing *UAW v. Scofield, supra*, but the charging party did not intervene in the appeal of the injunction issued under Section 10(1) even though that proceeding was also before the court.

Thus, there is no conflict among the courts of appeal. The Ninth and Tenth Circuits are in accord that a charging party does not have standing to appeal or the right to intervene; there is no contrary court of appeal decision and no court of appeal has expressed a view in conflict with that of the Ninth and Tenth Circuits.

Conclusion.

For the foregoing reasons, it is respectfully urged that the petition for writ of certiorari should be denied.

Respectfully submitted,

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